Supreme Court, U.S.
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NO. 90-1755

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

RABEN-PASTAL, a Joint Venture, comprised of RABEN BUILDERS, INC. and PASTAL CONSTRUCTION COMPANY,

Petitioners,

v.

CITY OF COCONUT CREEK, a Florida Municipal Corporation, and JAMES COWLEY,

Respondents.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONERS' REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

Raben-Pastal, a Joint Venture,
comprised of Raben Builders, Inc.
and Pastal Construction Company,

Petitioners,

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City of Coconut Creek, a Florida
Municipal Corporation, and
James Cowley,

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

I. THE CITY IS LIABLE UNDER 42 U.S.C. § 1983 BECAUSE IT EXPRESSLY DELEGATED ITS AUTHORITY CONCERNING THE LIFTING OF STOP-WORK ORDERS TO ITS CHIEF BUILDING OFFICIAL OR RATIFIED HIS DECISION.

Respondents ignore the uncontroverted evidence which mandates the liability of the City of Coconut Creek, Florida ("City") under § 1983 under this Court's decisions by suggesting that Petitioners could not prevail unless this Court

interpreted state law contrary to the Florida Supreme Court. That is not correct. Petitioners do not assail the Florida Supreme Court's finding that the Chief Building Official was not the *de jure* final policymaker. However, the uncontradicted evidence proved to the jury that the Chief Building Official was the *de facto* final policymaker in the City concerning the lifting of stop-work orders because the Board of Rules and Appeals, the *de jure* final policymaker for the City, delegated complete, unfettered authority to him or ratified his decision. (*Cochenour*, Jan. 8 T. 25; *Stewart*, Jan. 9 T. 92; *Cowley*, Jan. 13 T. 181-184). The City cannot insulate itself from liability under § 1983 "simply by delegating their policymaking authority . . . ." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S. Ct. 915, 925, 99 L.Ed.2d 107 (1988).

Respondents rely upon cases which actually support Petitioners' argument to this Court. In *Manor Health Care Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991), the Eleventh Circuit Court of Appeals refused to impose § 1983 liability on the City of Sunrise for the bribery and extortive activities of its Mayor. The Eleventh Circuit expressly noted that the City of Sunrise did not have a "custom or practice" which allowed the Mayor to function without any supervision or review with regard to zoning. *Id.* at 638. Moreover, the Eleventh Circuit noted that the Mayor was not executing any City policy when he violated the law regarding bribery and extortion. *Id.* In stark contrast, the lower courts herein ignored and did not discuss the undisputed evidence that the Board of Rules and Appeals for the City of Coconut Creek had a "custom or practice" of delegating its, *de jure*, "final policymaking authority" to the Chief Building Official.

Similarly, the Eighth Circuit Court of Appeals in *Williams v. Butler*, 863 F.2d 1398 (8th Cir. 1988) imposed liability under § 1983 on the City of Little Rock, Arkansas,

for the acts of a municipal court judge in firing a municipal court clerk. Unlike the lower courts herein, the Eighth Circuit correctly found that "an absolute delegation of authority" regarding employment matters to the municipal court judge established by the evidence was sufficient to impose liability under § 1983 upon the City of Little Rock. Thus, *Williams* fully supports Petitioners' argument that the "absolute delegation" established by the evidence is sufficient to impose liability on the City of Coconut Creek.

The Fifth Circuit in *Worsham v. City of Pasadena*, 881 F.2d 1336 (5th Cir. 1989), held that the existence of "meaningful review" by the City Council indicated that city officials who discharged a City employee were not the "final policymakers". Therefore, the Fifth Circuit necessarily found that there had not been "absolute delegation" to the City officials. However, the Fifth Circuit expressly noted that a finding of municipal liability may be proper if the "theoretical right of review . . . [was] ineffective and meaningless . . . ." Id. at 1341. Because the sole evidence in the case *sub judice* conclusively demonstrates that any review by the Board of Rules and Appeals was "ineffective and meaningless", *Worsham* does not support Respondents' argument.

Respondents also suggest that Petitioners' failure to cite *Jett v. Dallas Independent School Dist.*, 485 U.S. 112, 109 S. Ct. 2702, 105 L. Ed.2d 598 (1989), supports this Court's deference to the Florida Supreme Court's determination as to who is the "final policymaker" under Florida law. *Id.* at 2723-24. However, the lower courts in *Jett* did not have the benefit of this Court's decisions in *Pembauer v. Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L.Ed.2d 452 (1986) and *Praprotnik* when they decided the case, including the *de facto* exceptions to *de jure* final policymaking authority of delegation and ratification. This Court remanded *Jett* because the lower appellate courts had decided the case before these

seminal decisions. In contrast, both lower appellate courts herein discussed the decisions in *Pembauer* and *Praprotnik*. However, they ignored the uncontradicted evidence and jury findings which established the *de facto* exceptions recognized by this Court -- delegation and ratification.

II. THE CHIEF BUILDING OFFICIAL IS NOT IMMUNE FROM LIABILITY UNDER 42 U.S.C. § 1983 EVEN IF HE IS NOT THE "FINAL POLICY-MAKER" SUFFICIENT TO IMPOSE LIABILITY ON THE CITY.

Respondents apparently concede that the issue of individual liability under § 1983 was wrongfully decided, but argue that the Chief Building Official should be immune from liability because neither the Fourth District nor the Florida Supreme Court gave the issue of individual liability the same (albeit wrong) consideration as municipal liability. Respondents do not argue, not can they, that the lower courts' implicit rulings -- that the Chief Building Official is immune from liability for his constitutional tort because he lacked "final policymaking authority" sufficient to subject the City to liability for his acts -- are correct. Petitioners submit that the lower courts cannot preclude consideration by this Court of the issues of individual liability merely by refusing to address the issue.

CONCLUSION

Petitioners, RABEN-PASTAL, respectfully submit that the record cries out for a reversal less one more constitutional deprivation pass unnoticed as the law of the land. Petitioners respectfully request that the Court grant their Petition for Writ of Certiorari and direct the parties to submit briefs on the merits.

Respectfully submitted,

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